Inspirasi Elit Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–183–06 OF 2020
NOORIN BADARUDDIN J
27 JUNE 2021

Civil Procedure — Judicial review — Application for leave — Whether there were special circumstances — Whether applicant had arguable case — Whether application was frivolous or vexatious — Whether judicial review available to applicant when alternative internal remedy of appeal available — Whether decision should be stayed — Rules of Court 2012 O 53 r 2(4) — Income Tax Act s 33(1)

This was an application for leave to apply for, inter alia, an order for certiorari to quash the respondent's decision in the form of a notice of additional assessment for the year of assessment 2017 dated 2 June 2020 ('the decision'). The applicant was a property developer whereby vide letter dated 21 September 2012 ('approval letter'), the Jabatan Perancangan Pembangunan Majlis Perbandaran Pulau Pinang ('MPPP') had approved the applicant's application for planning permission for 336 units of service suites, six levels of podium and 37 units of shops. Via letter dated 30 January 2013, the MPPP approved the applicant's building plan with the condition that 30% of the units was to be sold to Bumiputera. The applicant made an application to the Pejabat Setiausaha Kerajaan Negeri Pulau Pinang Bahagian Perumahan ('SKPP') for the release of 95 Bumiputera units. The application was approved by SKPP and the applicant paid a financial contribution amounting to RM2,127,266.63 to facilitate the release of the 95 Bumiputera units. On 18 July 2019, the respondent issued its audit finding letter. On 14 August 2019, the applicant responded with explanation to the respondent among others stating that the contribution were payments for the purpose of releasing the low cost and Bumiputera status units. On 17 March 2020, the respondent informed the applicant on their audit findings, among others, that the contributions for the purpose of releasing the low cost and Bumiputera status units were not allowable for tax deductions. On 27 May 2020, the applicant responded by explaining, among others that the contribution was deductible under s 33(1) of the Income Tax Act 1967 ('the ITA') and/or s 44(6) of the ITA as they were said to be contributions to the Penang State Government. On 28 May 2020, the respondent rejected the applicant's explanation. Among others, the respondent stated that the contribution was not allowable for tax deductions as they were capital expenditure for the right to sell the low cost and Bumiputera units. On 1 June 2020 the applicant responded with a letter maintaining their position that the contribution was expenses deductible under the ITA. On 2 June 2020,

A the respondent raised the impugned notice of additional assessment. Hence, the applicant filed an application for leave to commence judicial review proceedings and contended that there were errors of law committed by the respondent in its decision by not giving effect to the provisions of the statutory legislation and decision of the superior court which amounted to a clear lack of
B jurisdiction on the part of the respondent. It was contended that the decision fell clearly within one of the exceptional circumstances warranting the availability of judicial review.

C **Held**, allowing the application:

(1) It was of the court's considered view that the applicant's complaint could not be said to be frivolous. The issues of clear lack of jurisdiction or blatant failure to perform some statutory duty or a serious breach of the principles of natural justice and legitimate expectation must be dealt with
D on the merit. The mere fact that the applicant could appeal to the Special Commissioners of Income Tax ('SCIT') did not mean that the applicant had lost its right to appeal to the High Court by way of judicial review. The previous decisions of the Court of Appeal and the High Courts were binding on the putative respondent and the failure to abide by such
E decisions or any misinterpretation of the law constituted an error of law amounting to a clear lack of jurisdiction and warranted the grant of leave (see paras 21, 26 & 36).

(2) The court was of the considered view that the issue was substantially, if
F not wholly, a question of law ie whether the respondent had any legal basis to disallow the claims of the applicant for the deduction of the contribution. At this stage, it was premature to determine if the granting of reliefs would amount to an abuse of process (see paras 40 & 45).

G (3) The applicant had strong merits in its judicial review application. The balance of convenience lay in the applicant's favour. This court agreed with the applicant's submission that if a stay was not granted, the applicant would suffer damage and injury which could not be remedied by the refund of taxes. On the other hand, the respondents would not be
H affected by the court's decision to grant the stay until the full and final determination of the judicial review application because in the event the judicial review application was subsequently disallowed at the substantive stage, the respondent would still be able to collect the taxes imposed on the applicant. The facts of the matter clearly demonstrated that leave for
I judicial review was warranted. The applicant had shown a prima facie case that it had exceptional circumstances relating to the impugned decisions (see paras 58–59).

[Bahasa Malaysia summary

Ini adalah permohonan kebenaran, antara lain, untuk suatu perintah certiorari untuk membatalkan keputusan responden yang mengemukakan notis taksiran tambahan bagi tahun taksiran 2017 bertarikh 2 Jun 2020 ('keputusan tersebut'). Pemohon adalah pemaju hartanah melalui surat bertarikh 21 September 2012 ('surat kelulusan'), Jabatan Perancangan Pembangunan Majlis Perbandaran Pulau Pinang ('MPPP') telah meluluskan permohonan kebenaran merancang bagi 336 unit suite servis, enam aras podium dan 37 unit kedai. Melalui surat bertarikh 30 Januari 2013, MPPP telah meluluskan pelan bangunan pemohon dengan syarat 30% daripada unit tersebut akan dijual kepada Bumiputera. Pemohon telah membuat permohonan ke Pejabat Setiausaha Kerajaan Negeri Pulau Pinang Bahagian Perumahan ('SKPP') untuk pelepasan 95 unit Bumiputera. Permohonan tersebut telah diluluskan oleh SKPP dan pemohon telah membayar caruman kewangan berjumlah RM2,127,266.63 bagi pembebasan 95 unit Bumiputera tersebut. Pada 18 Julai 2019, responden mengeluarkan surat auditnya. Pada 14 Ogos 2019, pemohon memberi penjelasan kepada responden antara lain menyatakan bahawa sumbangan tersebut adalah bayaran bagi tujuan melepaskan unit berstatus Bumiputera dan kos rendah. Pada 17 Mac 2020, responden memaklumkan kepada pemohon mengenai audit mereka, antara lain, bahawa sumbangan bagi tujuan melepaskan unit berstatus rendah dan bumiputera tidak dibenarkan untuk potongan cukai. Pada 27 Mei 2020, pemohon menjelaskan bahawa sumbangan tersebut boleh diketepikan di bawah s 33(1) Akta Cukai Pendapatan 1967 ('ACP') dan/atau s 44(6) ACP kerana ianya merupakan sumbangan kepada Kerajaan Negeri Pulau Pinang. Pada 28 Mei 2020, responden menolak penjelasan pemohon. Responden pula menyatakan bahawa sumbangan tersebut tidak dibenarkan untuk potongan cukai kerana ia adalah perbelanjaan modal untuk hak menjual unit-unit kos rendah dan Bumiputera. Pada 1 Jun 2020 pemohon menjawab dengan surat mengekalkan kedudukan mereka bahawa caruman itu adalah perbelanjaan yang boleh ditolak di bawah ACP. Pada 2 Jun 2020, responden telah mengeluarkan notis taksiran tambahan yang ditetapkan. Oleh itu, pemohon memfailkan permohonan kebenaran bagi memulakan prosiding semakan kehakiman dan menghujahkan bahawa terdapat kesilapan undang-undang yang dilakukan oleh responden di dalam keputusannya dengan tidak mengambilkira peruntukan undang-undang berkanun dan keputusan mahkamah atasan menunjukkan responden melampaui bidang kuasanya. Pemohon juga berhujah bahawa keputusan tersebut adalah jelas merupakaan keadaan luar biasa yang membolehkan semakan kehakiman.

Diputuskan, membenarkan permohonan:

(1) Mahkamah ini berpendapat bahawa aduan pemohon tidak boleh dikatakan sebagai remeh. Isu-isu kekurangan bidang kuasa yang jelas atau kegagalan untuk melaksanakan beberapa kewajipan statutori atau

pelanggaran serius prinsip keadilan semula jadi dan anggapan sah mesti didengar meritnya. Fakta bahawa pemohon boleh merayu kepada Pesuruhjaya Khas Cukai Pendapatan ('PKCP') tidak bermakna pemohon telah kehilangan hak untuk merayu kepada Mahkamah Tinggi melalui semakan kehakiman. Keputusan Mahkamah Rayuan dan Mahkamah Tinggi sebelum ini mengikat responden putatif dan kegagalan untuk mematuhi keputusan tersebut atau penafsiran undang-undang yang salah merupakan satu kesilapan undang-undang yang menjamin kebenaran semakan kehakiman (lihat perenggan 21, 26 & 36).

(2) Mahkamah ini berpendapat bahawa isu tersebut sebahagian besarnya, atau sepenuhnya, merupakan persoalan undang-undang iaitu sama ada responden mempunyai asas undang-undang untuk tidak membenarkan tuntutan pemohon bagi potongan sumbangan. Pada peringkat ini, adalah pramatang untuk menentukan sama ada relif tersebut merupakan penyalahgunaan proses (lihat perenggan 40 & 45).

(3) Pemohon mempunyai merit yang kuat di dalam permohonan semakan kehakimannya. Kelebihan memihak kepada pemohon. Mahkamah ini bersetuju dengan hujahan pemohon bahawa sekiranya permohonan tidak dibenarkan, pemohon akan mengalami kerugian yang tidak dapat diperbaiki dengan bayaran balik cukai. Sebaliknya, responden tidak akan terjejas dengan keputusan mahkamah untuk memberikan kebenaran tersebut sehingga keputusan penuh dan muktamad permohonan semakan kehakiman diberikan kerana sekiranya permohonan semakan kehakiman tidak dibenarkan di peringkat substantif, responden masih boleh mengutip cukai yang dikenakan ke atas pemohon. Fakta-fakta perkara tersebut dengan jelas menunjukkan bahawa kebenaran untuk semakan kehakiman boleh diberikan. Pemohon telah menunjukkan kes prima facie bahawa ianya merupakan keadaan luar biasa berkaitan keputusan yang dipertikaikan (lihat perenggan 58–59).]

Cases referred to

Almurisi Holding Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2020] MLJU 1631; [2020] 1 LNS 1439, HC (refd)

Bintulu Lumber Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (Civil Application No 08(f)-269–05 of 2018) (unreported), FC (refd)

Chang Shu Hua (P) v Goon Fook Hong [2015] 1 MLJcivp 21; [2008] 3 CLJ 429, CA (refd)

Godfrey Phillips (Malaysia) Sdn Bhd v Timbalan Ketua Pengarah Kesihatan (Kesihatan Awam), Kementerian Kesihatan Malaysia [2011] MLJU 1573; [2011] 9 CLJ 670, HC (refd)

Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185; [1987] CLJ Rep 110, SC (folld)

Hotel Sentral (JB) Sdn Bhd v Pengarah Tanah dan Galian Negeri Johor, Malaysia & Ors [2017] 5 MLJ 116; [2017] 6 CLJ 161, CA (refd)

Islamic Financial Services Board v Puan Marlin Fairol bt Mohd Faroque and Anor [2010] MLJU 653; [2010] 8 CLJ 173, HC (refd)
Kerajaan Malaysia v Jasanusa Sdn Bhd [1995] 2 MLJ 105, FC (refd)
Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent (M) Sdn Bhd & Anor [2017] 1 MLJ 563, FC (refd)
Ketua Pengarah Hasil Dalam Negeri v Mudah.My Sdn Bhd [2017] MLJU 162; [2017] 5 CLJ 283, CA (refd)
Kosma Palm Oil Mill Sdn Bhd v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257; [2003] 4 CLJ 1, FC (folld)
Magnum Holdings Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2018] MLJU 101; [2018] MSTC 30-151, HC (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1; [1999] 3 CLJ 65, FC (refd)
Metacorp Development v Ketua Pengarah Hasil Dalam Negeri [2011] 5 MLJ 447, HC (refd)
Multi-Purpose Holdings Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2001] 8 CLJ 462, HC (refd)
Multi-Purpose International Limited v Ketua Pengarah Hasil Dalam Negeri [2020] MLJU 202; [2020] 1 LNS 49, HC (refd)
Nasioncom Holdings Bhd v Suruhanjaya Sekuriti [2008] 4 MLJ 620, HC (refd)
OSK & Partners Sdn v Tengku Noone Aziz & Anor [1983] 1 MLJ 179, FC (refd)
Petaling Tin Bhd v Lee Kiam Chan [1994] 1 MLJ 657, SC (refd)
Prima Nova Harta Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (Appeal No WA-14–7–12 of 2019) (unreported), HC (refd)
QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164, CA (refd)
R v Secretary of State for Education and Science, ex parte Avon County Council [1991] 1 All ER 282, CA (refd)
Ridge v Baldwin and others [1963] 2 All ER 66, HL (refd)
Sabah Berjaya Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri [1999] 3 MLJ 145, CA (refd)
Society of La Salle Brothers v Ketua Pengarah Hasil Dalam Negeri [2018] 1 MLJ 376; [2017] 8 CLJ 298, CA (refd)
Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah [1998] 3 MLJ 1, CA (refd)
Tan Bun Teet & Ors v Menteri Sains, Teknologi dan Inovasi Malaysia & Ors [2013] 3 MLJ 676; [2013] 3 CLJ 1115, CA (refd)
Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2006] 5 MLJ 60; [2006] 1 CLJ 927, CA (refd)
Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional [2015] MLJU 2268; [2015] 3 AMR 35, CA (refd)
Walter Annamunthodo v Oilfields Workers' Trade Union [1961] AC 945, HL (refd)
WRP Asia Pacific Sdn Bhd v Tenaga Nasional Berhad [2012] 4 MLJ 296, FC (refd)

YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v Datuk Bandar Kuala Lumpur & Anor [2003] 5 MLJ 128; [2003] 1 CLJ 210, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 96(a)
Federal Constitution art 96
Income Tax Act 1967 ss 33(1), 44(6), 99
Labuan Business Activity Tax Act 1990 s 2
Rules of Court 2012 O 53 rr 2(4), 3(5)

Ashrina Ramzan Ali (Kwan Huey Shin with her) (Revenue Counsel, Inland Revenue Board) for the applicant.
S Saravana Kumar (Rosli Dahlan Saravana Partnership) for the respondent.

Noorin Badaruddin J:

[1] This is an application filed by the applicant for leave to apply for among others an order for certiorari to quash the respondent's decision in the form of notice of additional assessment for the year of assessment 2017 dated 2 June 2020 ('the decision').

BRIEF FACTS

[2] The applicant is a property developer based in Kuala Lumpur and involved mainly in the activity of property development.

[3] Via letter dated 21 September 2012 ('the approval letter'), the 'Jabatan Perancangan Pembangunan Majlis Perbandaran Pulau Pinang' ('MPPP') had approved the applicant's application for planning permission for 336 units of service suites, six level of podium and 37 units of shops. One of the conditions in the approval letter states that the applicant is required to build 30% low cost and medium cost units for the service suites which are to be sold at RM70,000 per unit or to pay the same amount to the 'Bahagian Perumahan Kerajaan Negeri'. Accordingly, the applicant paid the financial contribution amounting to RM7,070,000 to facilitate the release of 101 low-cost units.

[4] Via letter dated 30 January 2013, the MPPP approved the applicant's building plan with the condition that 30% of the units is to be sold to Bumiputera.

[5] The applicant made an application to the 'Pejabat Setiausaha Kerajaan Negeri Pulau Pinang Bahagian Perumahan ('SKPP') for the release of 95 Bumiputera units. The application was approved by SKPP via its letter of 21 December 2016 and pursuant to the letter, the applicant was requested to

make a financial contribution to SKPP. The applicant paid the financial contribution amounting to RM2,127,266.63 to facilitate the release of the 95 Bumiputera units.

[6] On 18 July 2019, the respondent issued its audit finding letter. On 14 August 2019, the applicant responded with explanation to the respondent among others stating that the contribution are payments for the purpose of releasing the low cost and Bumiputera status unit.

[7] On 17 March 2020, the respondent informed the applicant on their audit findings among others, that the contributions for the purpose of releasing the low cost and Bumiputera status units are not allowable for tax deductions.

[8] On 27 May 2020, the applicant responded by explaining, among others that the contribution is deductible under s 33(1) of the Income Tax Act 1967 ('the ITA') and/or s 44(6) of the ITA as they are said to be contribution to the Penang State Government.

[9] On 28 May 2020, the respondent rejected the applicant's explanation. Among others, the respondent stated that the contribution is not allowable for tax deductions as they are capital expenditure for the right to sell the low cost and Bumiputera units.

[10] On 1 June 2020 the applicant responded with a letter maintaining their position that the contribution is expenses deductible under the ITA.

[11] On 2 June 2020, the respondent raised the impugned notice of additional assessment.

SUMMARY OF THE APPLICANT'S CONTENTIONS

[12] The applicant takes the position that there are errors of law committed by the respondent in its decision by not giving effect to the provisions of the statutory legislation and decision of the superior court which amounts to a clear lack of jurisdiction on the part of the respondent. It is contended that the decision falls clearly within one of the exceptional circumstances warranting the availability of judicial review.

SUMMARY OF THE ATTORNEY GENERAL'S CONTENTIONS

[13] The nub of the attorney general's submission is that leave for judicial review should not be granted as there is domestic remedy available in the form of appeal to the Special Commissioners of Income Tax ('SCIT') under s 99 of the ITA and that the applicant has failed to show special circumstances

warranting leave for judicial review. In addition, it is submitted that the application herein is an abuse of court's process and there are no special circumstances for stay to be granted.

SUMMARY OF THE PUTATIVE RESPONDENT'S CONTENTIONS

[14] The putative respondent herein is the Inland Revenue Board of Malaysia ('IRB') and as the application herein affects them, they have also raised their objections.

[15] Apart from taking the same stand as the attorney general where it is argued that the applicant should have resort its grievances through the appeal process under s 99 of the ITA, the putative respondent added that the applicant cannot bypass the SCIT since the purpose, nature and character of the payments must first be determined and whether the expenses incurred by the applicant is eligible to be deducted pursuant to s 33(1) of the ITA or is capital in nature. As there are disputed facts involved in this matter, it is argued that such determination can only be reached through the calling of witnesses and production of documentary evidence before the SCIT.

FINDINGS

[16] It is trite law that at the leave stage, the court should not consider the merit of the case. The applicant only has to show that it has an arguable case and its application is not frivolous or vexatious. In *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Berhad* [2012] 4 MLJ 296, the Federal Court held:

> Without the need to go into depth of the abundant of authorities, suffice if we state that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome.

[17] In *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60; [2006] 1 CLJ 927, the Court of Appeal held that at the leave stage, the applicant only has to establish that he has an arguable case to be granted leave for judicial review. The court held:

> The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it might, in the exercise of a judicial discretion, to give him leave to apply for that relief.

[18] The court's role is not, at this preliminary stage, to embark upon substantive submissions of the parties. The Court of Appeal in *Teh Guat Hong*

v Perbadanan Tabung Pendidikan Tinggi Nasional [2015] MLJU 2268; [2015] 3 AMR 35 through the judgment of Varghese George JCA (as he then was) explained as follows:

> It is trite that the 'leave' proceedings are intended to sieve out unwanted or frivolous applications before it moves to the substantive stage of proceedings. The assistance required by the court from the Attorney General's Chambers at this stage, in that context, was to appraise the court of any particular features of the case that would disqualify any leave being granted to the applicant concerned. It was not for the Chambers at this preliminary stage, in my view, to embark upon substantive submission on the jurisdiction of the court to entertain such an application.

[19] Order 53 r 2(4) of the Rules of Court 2012 provides that:

> Any person who is adversely affected by the decision, action or omission in relation to the exercise of the public duty or function shall be entitled to make the application.

[20] It cannot be disputed that the applicant herein is adversely affected by the impugned decision and as such the applicant has the necessary locus standi to file this application for judicial review. In *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164 at p 170, Gopal Sri Ram JCA (as he then was) held as follows:

> Historically speaking, the requirement of standing to approach a court for judicial review was one that was established by the courts to keep our litigants who had no legitimate grievance against the administrative arm of the State. The object was to prevent them from crossing the threshold of the courts of justice. This requirement established by judges for themselves that only those with a legitimate grievance may cross the threshold and enter the court is what is known as 'threshold locus standi'. It is quite different of 'substantive locus standi' which falls to be determined by court at the very end of the case when it comes to decide whether on the facts and circumstances discretion ought to be exercised in the applicants favour (see *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177).

[21] The court's attention is brought to the recent decision of the Federal Court in *Bintulu Lumber Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (Civil Application No 08(f)-269–05 of 2018) (unreported) where the court had unanimously granted leave to hear the issues of availability of judicial review in tax cases despite its earlier decision in *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent (M) Sdn Bhd & Anor* [2017] 1 MLJ 563 where it was held, inter alia, that a tax payer dissatisfied with the assessment or notice of assessment issued by the Director General of Inland Revenue ought to have exercised its right to appeal under s 99 of the ITA. What could be gleaned from the recent decision of the Federal Court in *Bintulu Lumber Development* is that despite its decision in *Alcatel-Lucent (M) Sdn Bhd* and the high threshold for leave to appeal to the Federal Court under s 96(a) of the Courts of Judicature

Act 1964, the Federal Court gave recognition of the importance of judicial review in challenging the executive's decision including the respondent as the tax collecting agency.

[22] It is of the considered view that the applicant's complaint cannot be said to be frivolous. The issues of clear lack of jurisdiction or blatant failure to perform some statutory duty or a serious breach of the principles of natural justice and legitimate expectation must be dealt with on the merit. In *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185; [1987] CLJ Rep 110 the question posed to the court was whether certiorari would issue where as in that case there is an alternative remedy open to the respondent therein to appeal to the SCIT under the ITA. It was argued on behalf of the appellant therein that the courts in this country have been consistent in refusing to grant an order of certiorari where an applicant had not exhausted the domestic remedy available to him. The Supreme Court answered as follows:

> In answer to the first question we would therefore hold that the discretion is still with the courts but where there is an appeal provision available to the applicant certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate case a serious breach of the principles of natural justice.

[23] The decision of the Supreme Court in *Government of Malaysia & Anor v Jagdis Singh* is a clear authority that the tax payer is entitled to resort to the remedy of judicial review in exceptional circumstances.

[24] Subsequently, the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65 addressed the alternative remedy point as follows:

> Speaking generally, it is right to say, that if an applicant in judicial review proceedings can demonstrate illegality, that is to say unlawful treatment, it would be wrong to insist that he exhaust his statutory right of appeal where one is available. Why should illegal action be not nipped in the bud by the quicker, more convenient and adequate remedy of judicial review rather appeal? It is, of course, true that convenience in this context means convenience not only for parties but also in the public interest, (*R v Huntingdon DC, ex p Cowan* [1984] 1 WLR 501 (a licensing appeal).

[25] The Court of Appeal in *Society of La Salle Brothers v Ketua Pengarah Hasil Dalam Negeri* [2018] 1 MLJ 376; [2017] 8 CLJ 298, had also held that a taxpayer cannot be precluded from judicial review where the respondent had acted without jurisdiction notwithstanding that the appeal process had not be resorted to. The court found as follows:

> Given that the respondent acted without jurisdiction, the third issue has to be resolved in favour of the appellant. Notwithstanding that it has failed to resort to the appeal procedure under s 99 of the ITA 1967, the appellant cannot be precluded from applying for judicial review. This principle was set out in *Government of Malaysia & Anor v Jagdis Singh* ...

[26] The mere fact that the applicant may appeal to the SCIT does not mean that the applicant has lost its rights to appeal to the High Court by way of judicial review. In *Walter Annamunthodo v Oilfields Workers' Trade Union* [1961] AC 945, on the question whether the appellant therein has lost his right to complain by appealing to the Annual Conference of Delegates, the House of Lords stated the followings:

> The third question is whether the appellant has lost his right to complain by appealing to the annual conference of delegates. As soon as he knew of his expulsion by the general council, he gave notice of appeal under r 11(7). He had the opportunity to put before the annual conference of delegates all his objections to his expulsion. He does not complain of any failure of natural justice by that body. And they affirmed his expulsion. So can he now complain? This reasoning was accepted by Archer and Wylie JJ They held ((1960), 2 WIR at pp 77, 78) that, by appealing, he had lost his right to complain of r 11(7) being invoked. Indeed, he himself invoked r 11(7) so as to appeal under it. So how can he now repudiate it? Their Lordships recognise the force of this reasoning, but they cannot agree with it. Even if the order of expulsion were capable of being affirmed or disaffirmed, their Lordships cannot regard an appeal as an act of affirmance. On the contrary, it is a disaffirmance — a complaint against the order of expulsion. If he had not appealed, it might have been said that he should have done so, that he should have exhausted all internal means of redress, before having recourse to the courts. Such a plea was upheld in the special circumstances that prevailed in *White v Kuzych*. It was, therefore, quite proper for him to appeal to the annual conference before coming to the courts, even though he was not bound to do so. But, having appealed and failed, he does not by so doing forfeit his right to redress in the courts. If the original order was invalid, for want of observance of the rules of natural justice, he can still complain of it, notwithstanding his appeal.

[27] In *Ridge v Baldwin and others* [1963] 2 All ER 66, the House of Lords reiterated the position as follows:

> Finally there is the question whether by appealing to the Secretary of State the appellant is in some way prevented from now asserting the nullity of the respondents' decision. A person may be prevented from asserting the truth by estoppel but it is not seriously argued that that doctrine applies here. Then it is said that the appellant elected to go to the Secretary of State and thereby waived his right to come to the court. That appears to me to be an attempt to set up what is in effect estoppel where the essential elements for estoppel are not present. There are many cases where two remedies are open to an aggrieved person but there is no general rule that by going to some other tribunal he puts it out of his power thereafter to assert

A his rights in court; and there was no express waiver because in appealing to the Secretary of State the appellant reserved his right to maintain that the decision was a nullity.

B **[28]** In the present matter, the applicant is contending that it cannot be disputed that from the letter from MPPP dated 21 September 2012, the applicant may apply to the Penang State Government for its approval to release the low-cost units and the Bumiputera units subject to the fulfillment of certain conditions. The applicant is arguing that in that regard, there is no consideration as the Penang State Government would still have a discretion C whether to approve the applicant's application. The applicant asserts that it had voluntarily made the contribution without any certainty regarding the approval of its application and as such the contribution constitutes gift. By imposing the additional tax to be paid for the impugned years of assessment, the applicant argues that the respondent had failed to consider the decision of D the Court of Appeal in *Sabah Berjaya Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri* [1999] 3 MLJ 145 where the court had found that the law in the context of gifts, the meaning of 'voluntary' is such that even a payment made under pressure ie a contractual obligation, could be voluntary so long as there E is no valuable consideration which would constitute a gift.

[29] The applicant further contends that the respondent had failed to give effect to s 44(6) of the ITA which provides that any gift of money made in the basis year to a state government or a local authority is deductible for that year F in arriving at the total income.

[30] In addition, the respondent is alleged to have failed to give effect to s 33(1) of the ITA which provides that all expenses incurred during that period in the production of income shall be deductible. According to the applicant, G even if it is found that such contribution does not constitute gift, the contribution should still be deductible as it is made in the hope that the Penang State Government would approve the applicant's application to release the low-cost and the Bumiputera units. It is applicant's position that if the low-cost H units and the Bumiputera units were released, the housing units can then be sold at a higher price and to non-Bumiputeras as well. That, according to the applicant would open the housing units to a wider market and, thus, produce income for the applicant. Hence, it would be deductible under s 33(1) of the ITA. It is the applicant's case that the failure of the respondent to appreciate and I give effect to the application of the ITA and the decision of the superior court amounts to a clear contravention of art 96 of the Federal Constitution that states:

> No tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of federal law.

[31] Illegality, unlawful treatment, error of law and failure to adhere to legal principles established by the courts would tantamount to an excess of jurisdiction that warrants court's intervention by way of judicial review (see *Ketua Pengarah Hasil Dalam Negeri v Mudah.My Sdn Bhd* [2017] MLJU 162; [2017] 5 CLJ 283 where the court stated that if the taxpayer can demonstrate illegality or unlawful treatment, then it would be wrong to insist on exhaustion of local remedy).

[32] In *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* the Federal Court has held that an error of law amounts to a lack of jurisdiction and certiorari will lie to correct it. The Federal Court stated as follows:

> In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the 'not to be challenged, etc.' kind, judicial review will lie to impeach all errors of law made by an administrative body or tribunal and, we would add, of inferior courts. In the words of Lord Denning in *Pearlman v Harrow School* (ibid) at p 70, 'No Court or tribunal has any jurisdiction to make an error of law of which the decision in a case depends. If it makes such an error it goes outside its jurisdiction and certiorari will lie to correct it'.

[33] Apparently, the same issue raised herein ie whether judicial review is available to an applicant when alternative internal remedy of appeal is available, had been ventilated before the High Courts. In *Metacorp Development v Ketua Pengarah Hasil Dalam Negeri* [2011] 5 MLJ 447, the applicant, a property development company, purchased two parcels of land and the lands were compulsorily acquired by the state government and the applicant was paid compensation. The applicant did not subject the compensation it had received to income tax and the Director General of Income Tax as the respondent therein raised notices of additional assessment with penalty against the appellant. The appellant appealed against the assessment. It was the applicant's case that the compensation it had received for compulsory acquisition was not subjected to income tax under the law and that the respondent had acted ultra vires and without any factual or legal basis in raising the said notices. Rohana Yusuf J (as Her Ladyship then was) held, inter alia, as follows:

> [8] It is clearly established by the Federal Court in the Majlis Perbandaran Pulau Pinang that an application for a judicial review is not barred by the non-exercise of its internal appeal procedure. *As stated by Edgar Joseph Jr FCJ in that case, whilst in theory the court often been recited with incantation that alternative remedy must be exhausted, in practice the courts are often much kinder to an applicant with good case. Having analysed the various conflicting decisions of the English cases in that case the Federal Court states that generally, if an applicant can demonstrate illegality or unlawful treatment then it would be wrong to insist on exhaustion of local remedy. The Federal Court acknowledged that in certain cases such as tax cases, appeal procedure is provided under the statute but if the applicant can demonstrate excess or abuse of power or a breach of natural justice, judicial review would still be granted. Indeed in the present case where*

there exist special circumstances, the respondent is not immune from the process of judicial review. Similar principle was applied by the High Court in *Kim Thye Co v Ketua Pengarah Jabatan Hasil Dalam Negeri, Kuala Lumpur* [1991] 3 CLJ Rep 20, which was subsequently upheld by the Supreme Court on appea.

[9] *Thus relying on the principle laid down in Majlis Per6andaran Pulau Pinang I hold that the availability of an alternative internal remedy in the form of an appeal process will not bar an application for judicial review. This is so especially where the complaint made to the court is one on error of law or abuse of power that goes to the legality of the conduct of the decision-making authority as in this case.*

[10] The applicant here had demonstrated illegality and unlawful treatment, thus it would be wrong to insist that it exhausts its statutory right of appeal, even if it is available. *In fact a complaint that raises a question of law, as in the present case, would preferably be referred to the court, being a more appropriate forum.* (Emphasis added.)

[34] In *Multi-Purpose International Limited v Ketua Pengarah Hasil Dalam Negeri* [2020] MLJU 202; [2020] 1 LNS 49, notices of assessment were issued by the respondent therein relating to securities held by the applicant to which the respondent was of the view inter alia, that the applicant's earning from the said securities investment did not fall within the definition under 'offshore non-trading activity' under s 2 of the Labuan Business Activity Tax Act 1990. Wong Siong Tung JC had held that:

In respect of the first ground of objection, as decided by the Supreme Court in *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185; [1987] CLJ Rep 110, Inland Revenue is not immune from the process of judicial review of its decision on tax assessment merely because there is available to the tax payer a right and procedure to appeal to the Special Commissioner under s 99 of the Income Tax Act 1967. The tax payer is entitled to resort to the remedy of judicial review in 'exceptional circumstances' where it was shown on the part of Inland Revenue that:

(a) there is clear lack of jurisdiction; or

(b) a blatant failure to perform some statutory duty; or

(c) in appropriate cases, a serious breach of the principles of natural justice; or

See also: *Society of La Salle Brothers v Ketua Pengarah Hasil Dalam Negeri* [2018] 1 MLJ 376; [2017] 8 CLJ 298 and *Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd & Anor*.

[35] In addition and more recently, the High Court at Kuala Lumpur in *Prima Nova Harta Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (Appeal No WA-14–7–12 of 2019) (unreported) had held that the cash contribution to obtain release of the Bumiputera lots quota is a deductible expense under s 33(1) of the ITA.

[36] The decisions of the Court of Appeal and the High Courts are binding on the putative respondent and the failure to abide by such decisions or any

misinterpretation of the law constitutes an error of law amounting to a clear lack of jurisdiction and warrants the grant of leave.

[37] In *Magnum Holdings Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2018] MLJU 101; [2018] MSTC 30-151, the applicant's complaint was that the Director General of Income Tax had failed to apply the legal position in *Multi-Purpose Holdings Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2001] 8 CLJ 462 (where the same parties were involved) and the the Director General of Income Tax was bound by the legal interpretation of that case. The only ground of objection by the Director General of Income Tax therein was that there was an alternative remedy of appeal under s 99 of the ITA. Azizah Hj Nawawi J (as Her Ladyship then was) held that:

> [27] Therefore, since the Mufti-Purpose case is binding on the DGIR, the failure to apply the principles in Mufti-Purpose case amounts to an excess of jurisdiction. In *Ketua Pengarah Hasil Dalam Negeri v Mudah.My Sdn Bhd* [2017] MLJU 162; [2017] 5 CLJ 283, the Court of Appeal held that if the taxpayer can demonstrate illegality, then it would be wrong to insist on the exhaustion of an alternative remedy, that is an appeal to the SCIT.

[38] Recently, the High Court at Johor Bahru in *Almurisi Holding Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2020] MLJU 1631; [2020] 1 LNS 1439 had held that submissions on the availability of an alternative remedy should only be considered by the court at the substantive stage of the application for judicial review and not during the hearing of the leave application. Evrol Mariette Peters JC held as follows:

> [14] Although I appreciated the respondent's arguments on this point, I was bound by the decisions of the Court of Appeal and Federal Court in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164; [2006] 2 CLJ 532, and *Chin Mee Keong & Ors v Pesuruhjaya Sukan* [2007] 6 MLJ 193; [2007] 5 CLJ 363, in holding that the existence of a domestic remedy only falls to be decided at the merits stage of proceedings, and not at the leave stage.

[39] The learned JC in *Almurisi Holdings* had correctly cited the case of *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164 where Gopal Sri Ram JCA (as he then was) in delivering the judgment of the Court of Appeal had stated:

> [6] In the light of the settled approach to be taken at the leave stage, we are of the respectful view that the learned judge erred in dealing with the alternative remedy argument at the leave stage. She should have curbed the enthusiasm of counsel for the respondents by informing them that the alternative remedy point is one that she was not prepared to deal with in limine but that it would have to be properly taken and dealt with at the hearing of the substantive motion.

[40] The next issue relates to the putative respondent's argument that the instant matter involves dispute of facts and that this matter ought to be ventilated before the SCIT where witnesses and evidence can be adduced. It is true that the issue involve in judicial review cases in usual scenario concerns the legal significance of established facts rather than resolving a disputed question of fact. In the instant matter and at this juncture this court is of the considered view that the issue involves is substantially, if not wholly, question of law ie whether the respondent has any legal basis to disallow the claims of the applicant for the deduction of the contribution. As stated by Rohana Yusuf J (as Her Ladyship then was) in *Metacorp Development v Ketua Pengarah Hasil Dalam Negeri*:

> [10] The applicant here had demonstrated illegality and unlawful treatment, thus it would be wrong to insist that it exhausts its statutory right of appeal, even if it is available. *In fact a complaint that raises a question of law, as in the present case, would preferably be referred to the court, being a more appropriate forum.* (Emphasis added.)

[41] The putative respondent had also averred that there is no legitimate expectation that has been created in this case and the principles of estoppel cannot be used against the state or local authorities.

[42] It has been established that denial of legitimate expectations that have properly arisen would be unduly oppressive and an abuse of power. The Court of Appeal in *Hotel Sentral (JB) Sdn Bhd v Pengarah Tanah dan Galian Negeri Johor, Malaysia & Ors* [2017] 5 MLJ 116; [2017] 6 CLJ 161 had stated as follows:

> [24] Whilst we accept executive freedom to formulate policy and decisions, it is incumbent upon the court to protect the interest of individuals whose expectations have been created by the very conduct of these particular bodies or authorities. *Legitimate expectation as a concept is now in effect a term of art capable of being enforced in law provided the expectation sought to be protected faces an onslaught by virtue of changes of policy and/or reversing decisions that had been acted upon by sections of the public. Whether or not this point has been reached, is to be determined by the court taking into account the rationality and the legality of a particular decision or its fairness, all of which the court is the sole arbitrator* (See *R v Ministry of Agriculture, Fisheries and Food; ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714). (Emphasis added.)

[43] The applicant is seeking for declaratory reliefs and certiorari to quash the decision of the respondent. In *OSK & Partners Sdn v Tengku Noone Aziz & Anor* [1983] 1 MLJ 179, the Federal Court had stated that the remedy of certiorari has undefined limits (see p 184 of the report).

[44] In regards to declaratory reliefs, the Supreme Court in *Petaling Tin Bhd v Lee Kiam Chan* [1994] 1 MLJ 657, had said:

> We would add that one of the great attractions of the declaration is that it is an all-purpose remedy which can be used in an extraordinarily wide variety of cases. And, as the late Prof E Borchard said at p 49 of his pioneering treaties on *Declaratory Judgments* (2nd Ed), one cannot talk in terms of causes of action in the strict sense because two of the main virtues of the declaratory action are to get relief before damage or to escape from dilemma and uncertainty by a clarification of the legal position.

[45] Therefore, at this stage it is premature to determine if the granting of reliefs would amount to an abuse of process.

STAY

[46] It has been established that a decision made by a public decision-making body could be stayed by an order of the court pending judicial review of the said decision. Order 53 r 3(5) of the Rules of the Court 2012 provides that:

> (5) The grant of leave under this rule shall not, unless the Judge so directs, operate as a stay of the proceedings in question.

[47] The High Court in *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v Datuk Bandar Kuala Lumpur & Anor* [2003] 5 MLJ 128; [2003] 1 CLJ 210 had held:

> The phrase 'a stay of the proceedings' must have a wider application. It does not confine to proceedings in a court only. Today, many applications for judicial review are for orders of certiorari to quash decisions of decision-making bodies other than courts, including government ministers, local authorities and other bodies whose decisions are susceptible to judicial review. *Thus the phrase 'a stay of the proceedings' in relation to such bodies must mean 'a stay of the process by which the decision challenged has been reached, including the decision itself…* Thus, as had been decided in *Ex parte Avon County Council*, *a decision made by an officer or minister of the crown as well as other relevant decision-making bodies can, in principle, be stayed by an order of the court. That the court should have the power to order a stay of a decision of a decision-making body pending the conclusion of a challenge to the decision-making process by way of judicial review.* (Emphasis added.)

[48] In regards to tax cases, this court is aware of the consistent recognition of our courts in granting stay. In *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105, Edgar Joseph Jr FCJ had stated as follows:

> It is not disputed that s 103(1) of the Act provides for the assessed amount to be due and payable upon service of the relevant notice, irrespective of whether there is any appeal, *but the Act does not have any provision curtailing or restricting the inherent jurisdiction of the court to stay an execution. When a party wishes to exercise a right to resort to the procedures of the court to enforce a judgment, that right is subject to the powers of the court which include a power under its inherent jurisdiction to stay an*

execution subject to established judicial principles …

…

With respect, in our view, neither s 103(1) nor s 106(3) bars a court, in appropriate circumstances, from exercising its inherent powers of granting a stay, even in a tax case. (See the Supreme Court decision in Chong Woo Yit v Government of Malaysia [1989] 1 MLJ 473 at p 475 col 2 last paragraph, per Gunn Chit Tuan CJ).

[49] The Federal Court in *Kerajaan Malaysia v Jasanusa Sdn Bhd* had further stated about balancing the need of the government to realize the taxes and the need of the taxpayer to be protected against arbitrary or incorrect assessment. The Federal Court stated in the following fashion:

> Matters of this nature involve, inter alia, balancing the need of the government to realize the taxes and the need of the taxpayer to be protected against arbitrary or incorrect assessments. The court should be ever vigilant against taxpayers who may use the procedure of the court, like applying for a stay of execution, to defer or postpone payment of his just dues or to abscond by migration or to dissipate the assets to defeat the judgment. The court should also bear in mind the possibility of arbitrary or incorrect assessments, brought about by fallible officers who have to fulfil the collection of a certain publicly declared targeted amount of taxes and whose assessments, as a result, may be influenced by the target to be achieved rather than the correctness of the assessment.

[50] It must be borne in mind that the applicant is applying for stay of the decision and not to restrain the respondent and/or the putative respondent from enforcing its decision. In *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah* [1998] 3 MLJ 1, the Court of Appeal speaking through the judgment of Gopal Sri Ram JCA (as he then was) viewed as follows:

> With respect, we are of the view that the learned judge fell into error in equating a stay with an injunction in the environment of public law remedies. In the context of O 53 r 1(5), an order of stay has the effect of temporarily suspending the effect of a public law decision pending the outcome of certiorari or prohibition proceedings brought to challenge the validity of the particular decision.By contradistinction, an injunction is directed at a party to a proceeding restraining him from doing, or requiring him to perform, a particular act. Put another way, an injunction acts in personam, a stay does not. It follows that as a matter of law, an order for stay is not an injunction. Both the statutory provisions relied upon by the learned judge do not therefore curtail, in any way, the power conferred upon a High Court by O 53 r 1(5).

[51] In *Godfrey Philips (Malaysia) Sdn Bhd v Timbalan Ketua Pengarah Kesihatan (Kesihatan Awam), Kementerian Kesihatan, Malaysia* [2011] MLJU 1573; [2011] 9 CLJ 670, the High Court observed the difference between a stay of execution of a decision of a public body and a stay of execution of a judgment of a court as follows:

A

> [28] It must be noted that a stay of the proceedings as in a suspension of a unilateral ex parte decision of an administrative decision maker is drastically different thing from a stay of execution of a judgment of a court of law after a full blown trial and a determination on the merits have been made inter partes. An attempt to equate the two processes would be inappropriate.

B

> [29] The court is of the considered opinion that in order to obtain stay and to restrain and/or prohibit the 1st respondent from acting on the Impugned Decision dated 21 January 2010, the applicant must establish that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of stay and/or prohibition order, that the balance of equities tips in its favour, and that a stay and/or prohibition order is in the public interest. In exercising its discretion, the court should pay particular regard to the public consequences in granting the orders sought by the applicant.

C

[52] The Court of Appeal in the judicial review case of *Tan Bun Teet & Ors v Menteri Sains, Teknologi dan Inovasi Malaysia & Ors* [2013] 3 MLJ 676; [2013] 3 CLJ 1115 later confirmed the principles enunciated in *Godfrey Phillips*.

D

[53] In determining whether a stay of the decision ought to be granted in judicial review proceedings, the special circumstances test as laid out by the Federal Court in *Kosma Palm Oil Mill Sdn Bhd v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1 applies where the Federal Court had stated, inter alia, that there are many factors that constitute special circumstances.

E

F

[54] In *Nasioncom Holdings Bhd v Suruhanjaya Sekuriti* [2008] 4 MLJ 620, the court held:

G

> [17] As to the proper exercise of this discretion, the court would need to consider whether there are special circumstances which warrant a stay of the proceedings. In this regard, support is drawn from the Federal Court case of *Kosma Palm Oil Sdn Bhd & Ors v Koperasi SerSausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1, which although is a case with respect to an application for stay of execution pending appeal, the principles as to what constitute 'special circumstances' would in my view, nevertheless apply. At p 266 F to p 267B, Augustine Paul JCA (now Federal Court judge) after referring to various authorities in particular opined, 'The definition of special circumstances only serves to emphasize the fact that there are myriad circumstances that could constitute special circumstances with each case depending on its own facts. I am of the opinion that the list of factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of the discretion less of a discretion. This is surely not what discretion is all about'.

H

I

[55] In *R v Secretary of State for Education and Science, ex parte Avon County Council* [1991] 1 All ER 282, Glidewell LJ had stated the followings:

Nevertheless, it is accepted that such a decision, or rather the method by which it was made, is open to challenge by judicial review. There is no impropriety, or challenge to parliamentary sovereignty, implicit in the court having power to defer the date at which such a decision takes effect. Such a deferment, pending the court's final decision, would be the effect of a stay.It is for these reasons that I conclude that the court has jurisdiction, in appropriate circumstances, to order a stay of the implementation of decisions such as those under challenge in these proceedings, pending the final resolution of that challenge.

[56] The Court of Appeal in *Chang Shu Hua (P) v Goon Fook Hong* [2015] 1 MLJcivp 21; [2008] 3 CLJ 429 acknowledged that the category of what constitutes special circumstances is not closed, and ought to be interpreted flexibly:

[34] Other factors must be taken into account in applying the special circumstances approach. These factors, and they are not exhaustive, may be listed as follows:

(a) whether damages would be an adequate remedy if the applicant who applies for the stay succeeds in his appeal?

(b) the public policy consideration that has to be taken into account;

(c) the need to examine the subject matter of the appeal;

(d) the need to weigh in a balance of the hardship of the parties involved;

(e) the delay in filing the application for a stay;

(f) whether the court would exercise its inherent jurisdiction to grant the stay; and

(g) where would the balance of convenience or the balance of justice lie?

[57] A wide interpretation should be given in a stay application in judicial review so as to enable the effectiveness of the judicial review jurisdiction and that the applicant is not denied the full benefit of a successful challenge. The status quo must be preserved by suspending the decision under challenge pending the determination of the judicial review. In *Islamic Financial Services Board v Puan Marlin Fairol bt Mohd Faroque and Anor* [2010] MLJU 653; [2010] 8 CLJ 173, Mohamad Ariff Yusof J elucidated as follows:

[4] I indicated in my decision that 'stay of proceedings' in the context of judicial review has a special connotation, and, although there could be overlaps in standards applied, judicial review stay is not the same as stay of execution after judgment in judicial proceedings. The wide import of judicial review stay has been recognized as well in *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Jaafar v Datuk Bandar Kuala Lumpur & Anor* [2003] 5 MLJ 128; [2003] 1 CLJ 210:

> The phrase 'a stay of proceedings' must have a wider application. It does not confine to proceedings in court only. Today, many applications for judicial review are for orders of certiorari to quash decisions of decision making bodies other than courts, including Government Ministers, local authorities and other

> bodies whose decisions are susceptible to judicial review. Thus the phrase 'a stay of proceedings' in relation to such bodies must mean 'a stay of the process by which the decision challenged has been reached, including the decision itself'.

[5] See also *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor & Another Appeal* [1998] 3 MLJ 289; [1998] 3 CLJ 85, where the Court of Appeal explained the effect of a stay as 'temporarily suspending the effect of a public law decision pending the outcome of certiorari or prohibition proceedings brought to challenge the validity of the particular decision.

[6] Counsel for the applicant, Mr Lim Heng Seng, also drew my attention to the decision in *R(H) v Ash-worth Hospital Authority* [2003] 1 WLR 127, where the English Court of Appeal has usefully and clearly explained the purpose of stay, described by counsel as the 'denial of full benefit of successful challenge' test:

> The purpose of stay in a judicial review is clear. It is to suspend the 'proceedings' that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success ... In my view it should also be given a wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction.

[7] This preservation of the status quo argument is similar to the position taken in, for example, *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Jaafar v Datuk Bandar Kuala Lumpur & Anor* that stay should be granted so as not to render the substantive motion for judicial review nugatory. The precise formula adopted by courts has not been consistent, but the test of 'special circumstances' is a pragmatic test which, to my mind, can embrace even preservation of status quo or prevention of nugatory effect or prevention of the full benefits of success tests.

[8] I held, when rendering the decision on stay, thus:

> After considering the authorities, there is merit and justification in following the 'special circumstances' test as propounded in *Nasioncom Holdings v Suruhanjaya Sekuriti*, as a useful and workable test to guide the exercise of the court's discretion under O 53 r 3(5). Indeed, the 'nugatory effect' test can be subsumed under 'special circumstances', as indicated in *Kosma Palm Oil Mill Sdn Bhd v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1. Although Kosma is not an Order 53 application, there is no reason in principle why this test cannot apply to judicial review as well. Even the 'denial of full benefit of successful challenge' test can be brought within this overriding principle.
>
> Matters of public policy, parliamentary intent and the international obligation of Malaysia as the host country under the ISFB Agreement are at stake here, and it will be detrimental to these if this court were to refuse stay of proceedings and later rule in favour of IFSB on the substantive application. The detrimental effect to the first respondent's interest will be slight since this court will grant an early hearing of this matter.

[58] It is of the considered view that the applicant has strong merits in its judicial review application. The balance of convenience lies in the applicant's favour. This court agrees with the applicant's submission that if a stay is not granted the applicant will suffer damage and injury which cannot be remedied by the refund of taxes. On the other hand, the respondents would not be affected by the court's decision to grant the stay until the full and final determination of the judicial review application because in the event the judicial review application is subsequently disallowed at the substantive stage, the respondent will still be able to collect the taxes imposed on the applicant.

CONCLUSION

[59] It remains the case that the threshold at the leave stage is very low and the result of every leave application turns on its own facts based on the test. The facts of the present matter clearly demonstrate that leave for judicial review is warranted. The applicant has shown a prima facie case that it has exceptional circumstances relating to the impugned decisions.

[60] Premised on the above this court granted the leave for judicial review and stay application by the applicant.

Application allowed.

Reported by Muhamad Azham Marwan